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Nos. 03-1108 and 03-1111

In the
Supreme Court of the United States

DAKOTA RURAL ACTION, *et al.*,

Petitioners,

v.

SOUTH DAKOTA FARM BUREAU, INC., *et al.*,

Respondents.

CHRIS NELSON, SECRETARY OF STATE OF SOUTH DAKOTA, *et al.*,

Petitioners,

v.

SOUTH DAKOTA FARM BUREAU, INC., *et al.*,

Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* NATIONAL FARMERS UNION, SOUTH DAKOTA FARMERS UNION, NORTH DAKOTA FARMERS UNION, MINNESOTA FARMERS UNION, IOWA FARMERS UNION, CAMPAIGN FOR FAMILY FARMS, WESTERN ORGANIZATION OF RESOURCE COUNCILS, DAKOTA RESOURCE COUNCIL, NATIONAL FAMILY FARM COALITION, AND FRIENDS OF THE CONSTITUTION IN SUPPORT OF PETITIONERS

SUSAN E. STOKES
Counsel of Record
DAVID R. MOELLER
Farmers' Legal Action Group, Inc.
46 E. 4th Street, Suite 1301
St. Paul, MN 55101
(651) 223-5400

Counsel for Amici Curiae

2004 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

Pursuant to Rule 37.2(b) of the Rules of this Court, National Farmers Union, South Dakota Farmers Union, North Dakota Farmers Union, Minnesota Farmers Union, Iowa Farmers Union, Campaign For Family Farms, Western Organization of Resource Councils, Dakota Resource Council, National Family Farm Coalition, and Friends of the Constitution (collectively, "*Amici Curiae*") respectfully move for leave to file the accompanying brief as *Amici Curiae* in support of the Petitions for Writ of Certiorari filed by Petitioners the South Dakota Secretary of State, *et al.* and Dakota Rural Action, *et al.* Petitioners have consented to the filing of this brief; their letters of consent have been lodged with the Clerk of the Court. Counsel for Respondents have not consented to the filing of this *amici curiae* brief, necessitating this motion.

Amici Curiae represent 76 farmer-based organizations representing several hundred thousand members who have advocated for many years for the preservation and strengthening of the family farm system of agriculture and rural communities across the nation. *Amici Curiae* support granting the two petitions in this case. They write separately in order to emphasize the broad importance of this case by articulating the concerns of farmers and rural communities in a multitude of other states with similar laws restricting corporate participation in agriculture.

Amici Curiae are concerned about the potential ramifications if this case is left unreviewed by this Court. The Eighth Circuit Court of Appeals struck down South Dakota's constitutional amendment, known as Amendment E, restricting corporations from farming or having an interest in farmland. This decision threatens states' legitimate attempts to foster the family farm system of agriculture and puts rural communities at risk. The Eighth Circuit's decision would

leave vulnerable to dormant Commerce Clause challenge many other important state laws regulating corporate engagement in agriculture. *Amici Curiae* have worked to enact and protect state laws like Amendment E that support family farmers; they therefore have an interest in supporting the Petitions for Writ of Certiorari.

In light of the important issues being raised in this case, *Amici Curiae* respectfully request that their Motion for Leave to File Brief of *Amici Curiae* be granted.

Respectfully Submitted,

SUSAN E. STOKES
Counsel of Record
DAVID R. MOELLER
Farmers' Legal Action Group, Inc.
46 E. 4th Street, Suite 1301
St. Paul, MN 55101
(651) 223-5400

Counsel for Amici Curiae

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici Curiae have an interest in this case because these 76 farmer-based organizations and their several hundred thousand members believe in preserving the family farm system of agriculture.

National Farmers Union (NFU), officially called the Farmers Educational and Cooperative Union of America, was founded in 1902. NFU is a general farm organization with a membership of nearly 250,000 farm and ranch families throughout the United States. NFU is a federation, with the presidents of the 23 state and one regional (covering three states) Farmers Union organizations serving as its board of directors. For more than 100 years, NFU's primary goal has been to sustain and strengthen family farm and ranch agriculture. NFU believes that a vibrant agricultural sector is the foundation for strong farm and ranch families and thriving rural communities, which are, in turn, vital to the health and economic well being of the entire U.S. economy.

South Dakota Farmers Union (SDFU) is a grassroots membership organization that serves the needs of rural South Dakota. SDFU has been the voice of the family farm in South Dakota for nearly a century, acting as the farmers' "hired hand" in the halls of state and federal government. SDFU's mission is to preserve the family farm, ranch, and rural communities. Building on a foundation of education, legislation, and cooperation, SDFU has provided guidance and support for farmers, small businesses, and rural communities throughout the state. SDFU is a member of National Farmers Union.

Founded in 1927, North Dakota Farmers Union

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

(NDFU) is a producer-controlled organization dedicated to serving its 37,000 North Dakota family members. NDFU is committed to providing effective grassroots leadership in rural America. NDFU believes that the family farm system of agriculture is the only way to ensure rural and urban stability, national prosperity, the preservation of human and natural resources, and the dignity of the individual and the family. NDFU is a member of National Farmers Union.

Minnesota Farmers Union (MFU) is a non-profit membership-based organization with approximately 23,400 members, about 95 percent of whom are Minnesota farmers. Founded in 1929, MFU works to protect and enhance the economic interests and quality of life of family farmers and ranchers in rural communities. MFU has lobbied at the Minnesota legislature to protect Minnesota's corporate farming law, Minn. Stat. § 500.24, which restricts non-family corporations from farming in Minnesota. This law is important to MFU's family farmer members who endeavor to sustain a strong economy and healthy environment in rural Minnesota. MFU is a member of National Farmers Union.

Iowa Farmers Union (IFU) is a non-profit advocacy group representing family farmers across the state of Iowa. IFU's mission is to promote a viable system of sustainable agriculture and a high quality of life in rural communities through education of farmers, rural residents, and urban consumers; cooperation among farmers; and community activism. IFU has worked to preserve Iowa's restrictions on corporate ownership of farmland and livestock by, among other things, joining with other farm organizations in submitting *amici curiae* briefs in support of Iowa's corporate farming law. *See Smithfield Foods, Inc. v. Miller,* 241 F. Supp. 2d 978 (S.D. Iowa. 2003), *appeal pending,* No. 03-1411 (8th Cir.). IFU is a member of National Farmers Union.

The Campaign for Family Farms (CFF) is an unincorporated association of family farm and community

membership organizations comprised of the Land Stewardship Project (Minnesota), Iowa Citizens for Community Improvement, Missouri Rural Crisis Center, Illinois Stewardship Alliance, and Citizens Action Coalition of Indiana. CFF and its member organizations work to foster an ethic of stewardship for farmland, promote sustainable agriculture, and develop sustainable communities. They seek to develop and implement farm policies, farming practices, and marketing systems that help family farms and rural communities thrive. CFF works for thousands of family farmers who raise livestock and crops and who believe family farming is an important element of the economies and environment of rural communities. CFF and its organizations believe anti-corporate farming laws, which prohibit non-family corporations from farming, are an important part of state policy supporting family farming and may be put in question by the ruling in this case. On behalf of independent hog farmers, CFF has brought a constitutional claim to end the mandatory pork checkoff program. *See Michigan Pork Producers Ass'n v. Veneman*, 348 F.3d 157 (6th Cir. 2003), *petition for cert. filed,* (U.S. Feb. 19, 2004) (No. 03-1180).

The Western Organization of Resource Councils (WORC) is a network of grassroots organizations from seven states that includes 8,250 members and 49 local community groups. WORC's seven state organizations are: the Dakota Resource Council (North Dakota), Dakota Rural Action[2] (South Dakota), the Idaho Rural Council, the Northern Plains Resource Council (Montana), Oregon Rural Action, the Powder River Basin Resource Council (Wyoming), and the Western Colorado Congress. WORC's mission is to advance the vision of a democratic, sustainable, and just society

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[2] Dakota Rural Action is a Petitioner in this case. Neither Dakota Rural Action nor its counsel authored in whole or in part this brief, and Dakota Rural Action did not make a monetary contribution to the preparation or submission of this brief.

through community action. WORC is committed to building environmentally and economically sustainable communities that balance economic growth with the health of people and stewardship of their land, water, and air resources. On behalf of independent cattle farmers and ranchers, WORC has brought a constitutional claim to end the mandatory beef checkoff program. *See Livestock Mktg. Ass'n v. USDA,* 335 F.3d 711 (8th Cir. 2003), *petitions for cert. filed,* (U.S. Feb. 13, 2004) (Nos. 03-1164 and 03-1165).

Dakota Resource Council (DRC) is a grassroots organization formed in 1978 to protect North Dakota's land, air, water, rural communities, and agricultural economy. DRC is working for preservation of family farms, enforcement of corporate farming laws, protection of groundwater and clean air, and renewable energy. DRC's mission is to form enduring, democratic local groups that empower people to influence decision-making processes that affect their lives.

Formed in 1986, the National Family Farm Coalition (NFFC) represents 30 grassroots farm and rural advocacy organizations in more than 27 states committed to preserving and enhancing a family farm food production system in the United States. NFFC's work includes education, outreach, and advocacy for stable rural communities, safe food, and the preservation of natural resources through family farming.

Friends of the Constitution is a 19–member coalition of farm, church, and environmental groups concerned about corporate farming. The groups have joined together to defend and enforce Initiative 300, the Nebraska constitutional amendment banning non-family farm corporations, which was adopted by the citizens of Nebraska in 1982. Friends of the Constitution's member groups are: American Corn Growers Association; Citizens for Air, Resources and Environment (CARE); Center for Rural Affairs; Custer County Sustainable Agriculture Society; League of Rural Voters; Mid-Nebraska PRIDE; Nebraska Appleseed Center

for Law in the Public Interest; Nebraska Catholic Conference; Nebraska Chapter—Sierra Club; Nebraska Grange; Nebraska Lutheran Advocacy; Nebraska Farmers Organization; Nebraska Farmers Union, which is a member of National Farmers Union; Nebraska Wildlife Federation; Nebraska—Worth Fighting For; Northeast Nebraska Ag Support Group; Saunders County Livestock; Save Our Rural Resources (SORR); and Women Involved in Farm Economics (WIFE).

Amici Curiae have sought to enact and protect state laws that support family farmers and therefore have an interest in seeking that this Court grant the Petitions for Writ of Certiorari and reverse the Eighth Circuit's decision, which is incorrect as a matter of law and is inconsistent with Supreme Court precedent.

SUMMARY OF THE ARGUMENT

Rural America has seen significant changes over the past several decades. With the rise of concentration and vertical integration in agriculture, farming has become increasingly industrialized. While the number of farms has fallen dramatically, the size of farms has increased. In an attempt to address the adverse effects this trend has had on rural communities, states and citizens have enacted laws and constitutional amendments that, to varying levels, regulate or restrict corporations from owning farmland or engaging in farming. South Dakota's constitutional amendment, known as "Amendment E," was passed in 1998 by 59 percent of those voting in the referendum, and similarly addresses problems caused by corporate agriculture. In analyzing whether Amendment E violates the dormant Commerce Clause, the Eighth Circuit did not consider whether the text of the amendment discriminated against out-of-state interests, or whether it had a discriminatory effect, but rather viewed and weighed evidence of the intent of the proponents of the

amendment. Based only on evidence that the proponents' purpose in supporting Amendment E was to ensure that rural South Dakota did not suffer the same environmental, economic, and sociological problems as other states with concentrated industrial agriculture, the court reviewed Amendment E with strict scrutiny. The Eighth Circuit erred by applying a strict scrutiny standard based solely on evidence of discriminatory intent when the amendment did not discriminate on its face or in effect. This Court's dormant Commerce Clause decisions have not applied a strict scrutiny standard based on discriminatory intent alone.

Because Amendment E treats all corporations the same, whether based in or outside South Dakota, the Eighth Circuit should have balanced South Dakota's legitimate interest in choosing the type of agriculture it wishes to foster with any incidental burdens on interstate commerce. If the proper balancing test were applied, Amendment E would fall in line with a host of other state regulations that have been upheld as legitimate. The states' ability to regulate agriculture and ensure continued viability of rural communities will be jeopardized unless this Court grants the petitions of the South Dakota Secretary of State, *et al.*, and Dakota Rural Action, *et al.* and reverses the Eighth Circuit's erroneous decision.

ARGUMENT

I. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW WEAKENS STATES' AND CITIZENS' EFFORTS TO PRESERVE THE FAMILY FARM SYSTEM NATIONWIDE

This Court should grant the two petitions in this case because leaving intact the decision below weakens states' and citizens' efforts to preserve the family farm in South Dakota and throughout the nation. By striking down South Dakota's constitutional amendment restricting corporations from farming or having an interest in farmland (with certain

exceptions), the Eighth Circuit's decision undermines the family farm to the detriment of rural communities.

For-profit corporations are creatures of state laws designed to allocate capital in what is deemed the most "efficient" manner without regard to communities, neighborhoods, and families. *See Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 565 (1933) (Brandeis, J., dissenting) ("Through size, corporations, once merely an efficient tool employed by individuals in the conduct of private business, have become an institution—an institution which has brought such concentration of economic power that so-called private corporations are sometimes able to dominate the State."). In contrast, family farms, and the families that operate them, strive for different goals: building sustainable rural communities, promoting responsible stewardship of soil, water, and other resources, and ensuring through family ownership that land can be farmed by future generations. *See, e.g.,* Marty Strange, *Family Farming: A New Economic Vision* 32-42 (1988). *Amici Curiae* believe that allowing corporations to enter into farming in South Dakota, and potentially in other states, would undermine family farms and the rural communities that these organizations have advocated to preserve and strengthen. *See* Jon Lauck, *Toward an Agrarian Antitrust: A New Direction for Agricultural Law*, 75 N. Dak. L. Rev. 449, 494-95 (1999) (noting state anti-corporate farming laws enhance farmers' bargaining power).

If the Eighth Circuit's decision is not reversed, it could open the floodgates to challenges of state laws that restrict, to varying degrees, corporations from engaging in farming and owning agriculture land in eight other states. *See* Iowa Code §§ 9H.1 to 9H.15; Kan. Stat. Ann. §§ 17-5902 to 17.5904; Minn. Stat. § 500.24; Mo. Rev. Stat. § 350.015; Neb. Const. Art. XII, § 8; N.D. Cent. Code §§ 10-06.1-01 to 10.06.1-27; Okla. Const. Art. XXII, § 2; and Wis. Stat. § 182.001. These laws — or some version of them — have

been in place for decades, including North Dakota's anti-corporate farm statute, which was first enacted in 1932, and South Dakota's Family Farm Act of 1974. *See* S.D. Codified Laws §§ 47-9A-1 to 47-9A-23; N.D. Cent. Code §§ 10-06.1-01 to 10.06.1-27. These laws are necessary for a number of reasons, but the overarching reason—the protection of family farms—was succinctly articulated by the Minnesota legislature in the purpose section of that state's anti-corporate farming law:

> The legislature finds that it is in the interests of the state to encourage and protect the family farm as a basic economic unit, to insure it as the most socially desirable mode of agricultural production, and to enhance and promote the stability and well-being of rural society in Minnesota and the nuclear family.

Minn. Stat. § 500.24, subd. 1.

The threat to family farming addressed by these laws may best be illustrated by considering the dramatic consequences of concentration and consolidation of corporate power in the hog industry over the past two decades. USDA statistics show the steady exit of independent hog farmers from the hog industry in the past 20 years. In the mid-1980s, there were approximately 500,000 hog farms in the nation; as of year-end 2002, the number had shrunk to 75,350 hog operations. USDA National Agricultural Statistics Service Quarterly, *Hogs and Pigs Report* (Dec. 30, 2002), *available at* http://jan.mannlib.cornell.edu/reports/nassr/livestock/phpbb/2002/hgpg1202.txt. Large corporate interests are replacing independent family hog farms. While the number of hog farms has declined, the total number of hogs produced has remained relatively stable, resulting in increasingly large hog operations. William D. McBride & Nigel Key, *Economic and Structural Relationships in U.S. Hog Production-*

Agricultural Economic Report No. 818, 5 (Feb. 2003), *available at* http://www.ers.usda.gov/publications/aer818/aer818.pdf. Those farmers who do raise hogs are increasingly raising them not as independent producers but on behalf of others, usually a packer or packer affiliate. A 2002 study shows that more than 83 percent of hogs were committed to packers before slaughter through packer ownership or contractual arrangements, up from 38 percent in 1994. University of Missouri and National Pork Board, *Hog Marketing Contract Study* (Jan. 2002), *available at* http://agebb.missouri.edu/mkt/vertstud.htm.

The shift toward vertical integration and corporate ownership of livestock has had devastating economic effects on independent family farmers and their rural communities. As packer ownership and control of hogs increases and the number of packers shrinks,[3] independent hog farmers find themselves without a competitive market in which to sell their hogs. Packers owning or controlling hogs have less need of an independent farmer's relatively small number of hogs. Independent hog farmers are unable to find buyers willing to pay a competitive price for their hogs, driving them out of business or into unfavorable contracts with packers.[4] *See, e.g.*, Neil E. Harl, *The Structural Transformation of Agriculture* 4-

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[3] In 2000, four firms controlled 56 percent of the nation's hog processing industry. USDA Grain Inspection, Packers and Stockyards Administration, *Assessment of the Cattle and Hog Industries Calendar Year 2001*, 18, 38 (June 2002), *available at* http://www.usda.gov/gipsa/pubs/01assessment/01assessment.pdf.

[4] At least one study has shown that prices paid to independent hog producers decrease as packers' control of production increases. That study found that at the "10 percent level of integration, the price paid to independents declines by six percent. At 50 percent integration, the price declines by about 26 percent." Azzadine M. Azzam & Allen C. Wellman, *Packer Integration into Hog Production: Current Status and Likely Impacts of Increased Vertical Control on Hog Prices and Quantities*, University of Nebraska Agriculture Research Bulletin 315-F (1992).

5 (March 20, 2003), *available at* http://www.econ.iastate .edu/faculty/harl/StructuralTransformationofAg.pdf.

This trend of losing family farms while the size of farms has expanded extends well beyond the hog industry. The number of farmers in the United States fell from 6.8 million in 1935 to less than 2 million in 1997, while the average farm size has more than doubled from 155 acres in 1935 to 487 acres in 1997. Robert A. Hoppe, *Structural and Financial Characteristics of U.S. Farms: 2001 Family Farm Report*, ERS Agriculture Information Bulletin No. 768, 6-7 (May 2001), *available at* http://www.ers.usda.gov/ publications/aib768/aib768.pdf. Following this trend, South Dakota lost 14 percent of its farms between 1980 and 2001. USDA, South Dakota Agric. Statistics Serv., *South Dakota Farms, Land in Farms, and Livestock Farms* (Feb. 22, 2002), *available at* http://www.nass.usda.gov/sd/releases /farm0202.pdf.

The loss of independent family farmers has a ripple effect on rural communities. Studies have consistently shown that independent family farms contribute significantly more to healthy rural communities than do corporate-owned farms. As early as the 1940s, at the direction of the U.S. Senate, anthropologist Dr. Walter Goldschmidt compared two rural California communities in which the structure and size of farms were different, but the total value of farm production was almost identical. Walter Goldschmidt, *Small Business and the Community: A Study in the Central Valley of California on Effects of Scale of Farm Operations*, reprinted by Senate Special Committee to Study Problems of American Small Business, 79th Cong., 2d Sess., Report of the Special Committee 13 (Comm. Print. 1946). Goldschmidt concluded from his research that residents of the community with larger, industrialized farms realized a lower standard of living and quality of life compared to the residents of the community with smaller farms. *Id.*

A recent study comparing agriculture-dependent counties in states with anti-corporate farming laws, such as South Dakota, to those without such laws, found that agriculture-dependent counties in states with anti-corporate farm laws had fewer families in poverty, lower unemployment, and a higher percentage of farms realizing cash gains. Dr. Rick Welsh & Dr. Thomas A. Lyson, *Anti-Corporate Farming Laws, The "Goldschmidt Hypothesis" and Rural Community Welfare* 10-12 (2002), *available at* http://www.i300.org/I-300%20report.PDF. Another recent study concluded that areas with greater concentrations of family farms produce better health and socioeconomic conditions for children, as compared to areas with greater concentrations of industrial agriculture, which produce worse health and socioeconomic conditions for children. David J. Peters, *Revisiting the Goldschmidt Hypothesis: The Effect of Economic Structure on Socioeconomic Conditions in the Rural Midwest,* Missouri Economic Research and Information Center, P-0702-1 (July 2002), *available at* http:// www.missourifarmersunion.org/conf03/goldschmidt03.pdf.

The United States Department of Agriculture (USDA) similarly has recognized the benefits of family farms:

> Small farms contribute more than farm production to our society. Small farms embody a diversity of ownership, cropping systems, landscapes, biological organization, culture, and traditions. Since the majority of farmland is managed by a large number of small farm operators, the responsible management of soil, water, and wildlife encompassed by these farms produces significant environmental benefits. Decentralized land ownership produces more equitable economic opportunity for people in rural communities, and offers self-employment and business management opportunities. Farms,

> particularly family farms, can be nurturing places for children to grow up and acquire the values of responsibility and hard work.

A Time to Act: A Report of the USDA National Commission on Small Farms 8 (Jan. 1998), *available at* http://www.reeusda.gov/smallfarm/smlfrm1.pdf.

The loss of family farms inevitably leaves rural communities with lower overall incomes and an increase in poverty. *See generally,* Stephen Carpenter & Randi Ilyse Roth, *Family Farmers in Poverty: A Guide to Agricultural Law for Legal Services Practitioners*, 29 Clearinghouse Rev. 1087, 1089-91 (April 1996). Rural development experts have estimated that for every five to seven farms that go out of business, one business in the rural community closes. Osha Gray Davidson, *Broken Heartland: The Rise of America's Rural Ghetto* 57 (1990). Loss of competitive markets, lower incomes, increased unemployment, and an increase in poverty rates are of significant interest to the state, since they result in lower state tax revenues and increase a state's burden to respond to its citizens living in poverty. Similarly, degradation of health and socioeconomic conditions for children is undeniably a matter of interest to the state. South Dakota thus has a significant interest in ensuring that its rural communities remain vibrant by preserving the continued existence of independent family farmers. The means South Dakota chose to defend those interests, reasonable restrictions on corporate agriculture, have been shown to be effective. The Eighth Circuit's decision wrongly deprives states of an important tool for fostering healthy rural communities.

II. THE PETITIONS PRESENT IMPORTANT QUESTIONS REGARDING THE REACH OF THE DORMANT COMMERCE CLAUSE

In subjecting Amendment E to strict scrutiny solely because it found evidence of a discriminatory purpose, the

Eighth Circuit failed to follow this Court's prior decisions, and extended the dormant Commerce Clause doctrine beyond the bounds established by this Court's precedent. This expansion of the dormant Commerce Clause doctrine, if left unreviewed by this Court, leaves vulnerable a multitude of state laws concerning agriculture that hitherto have been considered well within the penumbra of legitimate state legislation. Indeed, if the test used by the Eighth Circuit is allowed to stand, and courts invalidate all state legislation enacted with any evidence of a "discriminatory" purpose — *i.e.*, evidence that the legislation is designed to have local benefits — without undertaking the traditional balancing of those benefits with the burden placed on interstate commerce, the result would be a *per se* finding of unconstitutionality of most state legislation. Such a restriction on the states' domain elevates the importance of the questions presented and weighs strongly in favor of granting the present petition.

This Court has long employed a two-step approach in analyzing state regulation of commerce. If a state regulation "discriminate[s] against interstate commerce 'either on its face or in practical effect,'" the regulation will be invalidated unless the state demonstrates "both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)); *see also*, *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994). If, on the other hand, a regulation "regulates evenhandedly, to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *see also, Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986). Whether a state

regulation runs afoul of the dormant Commerce Clause largely depends on whether it falls in the first analytical "tier," subjecting the regulation to strict scrutiny, or whether it will be analyzed under the *Pike* balancing test.

The Eighth Circuit incorrectly applied first "tier" strict scrutiny to Amendment E. The language of Amendment E is neutral on its face. It states in relevant part: "No corporation or syndicate may acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any real estate used for farming in this state, or engage in farming." S.D. Const. Art. XVII, §21.[5] Amendment E also regulates evenhandedly: it prohibits *all* non-farm corporations, regardless of where they were formed or currently operate, from farming or owning farmland in South Dakota. Because Amendment E discriminates neither on its face nor in effect, the Eighth Circuit should have reviewed it under the second "tier" *Pike* balancing test, as the district court did below.

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[5] By disregarding the nondiscriminatory language of the constitutional amendment entirely, the Eighth Circuit also disregarded one of the most basic tenets of statutory interpretation, namely, that the most reliable source for determining legislative intent is the language of the legislation itself. This Court has observed: "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation." *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400 (1966). The Eighth Circuit likewise has emphasized this principle, holding that when "statutes are straightforward and clear, legislative history and policy arguments are at best interesting, at worst distracting and misleading, and in neither case authoritative." *Northern States Power Co. v. United States,* 73 F.3d 764, 766 (8th Cir. 1996).

The Eighth Circuit's decision directly conflicts with this Court's decision in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978). In an attempt to address problems resulting from vertical integration in the petroleum industry within the state, the Maryland legislature prohibited petroleum producers or refiners from operating retail gas stations in Maryland. This Court upheld the statute, even though there were no producers or refiners in the state and the burden of the prohibition fell solely on out-of-state companies. *Id.* at 125. This Court found that the law treated out-of-state corporations the same as in-state corporations:

> While the refiners will no longer enjoy the same status in the Maryland market, in-state independent dealers will have no competitive advantage over out-of-state dealers. The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.

Id. at 126. This Court also rejected the argument that the regulation impermissibly burdened interstate commerce, observing that the Commerce Clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." *Id.* at 127-28, citing *Hughes v. Alexander Scrap Corp.*, 426 U.S. 794, 806 (1976). Maryland's statute prohibiting producers and refiners from operating gas stations in Maryland thus was upheld as a valid exercise of the state's authority to address problems relating to its gasoline market.

This Court's *Exxon* decision is in line with its other dormant Commerce Clause cases holding that state laws that regulate evenhandedly, even though they have some effect on interstate commerce, must be upheld unless the burden on interstate commerce "clearly outweighs the State's legitimate

purpose." *See, e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 474 (1981) (rejecting a dormant Commerce Clause challenge to a Minnesota statute banning the sale of retail milk in plastic, nonrefillable containers because the statute "regulates evenhandedly" by prohibiting all milk retailers from selling such products, and the state had an interest in conserving energy and natural resources); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987) (upholding an Indiana corporate takeover law that applied to all hostile tender offers even though its application would fall most often on out-of-state companies).[6]

By disregarding Amendment E's neutral language and its evenhanded application, the Eighth Circuit failed to properly balance South Dakota's legitimate interest in choosing the form of agriculture it wishes to promote, reversing the tide of decades of precedent. When courts, including this Court, have considered the states' legitimate interests, they have upheld similar state restrictions on corporate agriculture. *See Asbury Hospital v. Cass County*, 326 U.S. 207, 214-15 (1945) (rejecting an Equal Protection challenge to a North Dakota statute barring all corporations, except cooperatives, from owning farmland, holding the statute is an appropriate application of a state policy against the concentration of farming lands in corporate ownership); *State ex rel. Webster v. Lehndorff Geneva, Inc.*, 744 S.W.2d

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[6] This Court has also noted that the existence of in-state corporations that would be adversely affected is a "powerful safeguard against legislative abuse." *Clover Leaf Creamery*, 449 U.S. at 473 n. 17, citing *South Carolina Highway Dept. v. Barnwell Bros., Inc.* 303 U.S. 177, 187 (1938). South Dakota corporations are just as adversely affected by Amendment E as out-of-state corporations. For example, IBP, until it was acquired by Tyson, was a South Dakota-based company subject to the restrictions in Amendment E just like any other corporation. *See generally*, David R. Moeller, *The Problem of Agricultural Concentration: The Case of the Tyson-IBP Merger*, 8 Drake J. Agric. L. 33 (Spring 2003).

801, 805-06 (Mo. 1988) (rejecting an Equal Protection challenge to Missouri's restriction on corporate ownership of farmland, holding it serves a legitimate state interest and that without the restriction the legislature could not protect traditional farming communities). The Eighth Circuit itself denied an Equal Protection challenge to Nebraska Initiative 300 (after which South Dakota's Amendment E was patterned) that prohibits non-family farm corporations from owning and operating Nebraska farm and ranch land, holding:

> The people of Nebraska have made a reasonable judgment that prohibiting non-family corporate farming serves the public interest in preserving an agriculture where families own and farm the land. It is not for the courts to second-guess the wisdom of this judgment.

MSM Farms, Inc. v. Spire, 927 F.2d 330, 335 (8th Cir. 1991).

Cases in which courts did balance the state's interests in fostering family farms and rural communities when state regulations were challenged under the dormant Commerce Clause have found those interests outweigh any burdens placed on interstate commerce. *See, e.g., Parker v. Brown*, 317 U.S. 341, 362-63 (1943) (upholding California's raisin marketing order "because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities . . ."); *Hampton Feedlot v. Nixon,* 249 F.3d 814, 820 (8th Cir. 2001) (upholding Missouri's livestock price discrimination law, concluding: "The Missouri legislature has the authority to determine the course of its farming economy, and this measure is a constitutional means of doing so. We have no doubt that the state considered the potential harms and benefits to all stakeholders in creating its price discrimination law."); *see also*, *Pacific States Box & Basket Co. v. White*,

296 U.S. 176, 181, 184 (1935) (upholding state regulation of transportation of produce, stating: "The power of a State to proscribe standard containers in order to facilitate trading, to preserve the condition of the merchandise, to protect buyers from deception, or to *prevent unfair competition* is conceded.") (emphasis added).

As demonstrated in Petitioners' briefs and recognized by the district court in this case, South Dakota has legitimate reasons for enacting Amendment E. *See South Dakota Farm Bureau v. Hazeltine*, 202 F. Supp. 2d 1020, 1047 (D.S.D. 2002) (finding the express purpose of Amendment E is "to retain family farms and to prevent limited liability entities, regardless of their home base, from gaining control of the food supply."); *see also, supra,* 6-12. The Eighth Circuit erred by applying first "tier" strict scrutiny to Amendment E, which is neutral on its face and in effect. If allowed to stand, courts will begin to apply the test used by the Eighth Circuit in this case to state regulations that do not discriminate on their face or in effect based on minimal evidence of discriminatory intent, rather than balancing the states' legitimate interests with the burden imposed on interstate commerce. The result would be a significant encroachment on states' interests in enacting what have long been held to be legitimate and constitutional regulations for the health and benefit of their rural communities.

The Eighth Circuit's holding in this case that strict scrutiny could be triggered solely by a finding of discriminatory purpose also expands the reach of the dormant Commerce Clause beyond the boundaries of dormant Commerce Clause jurisprudence as applied by this Court. Citing *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984), the court said that if a law "has a discriminatory purpose," that is an "indicator of discrimination against out-of-state interests," thus triggering strict scrutiny. *South Dakota Farm Bureau v. Hazeltine*, 340 F.3d 583, 593 (8th

Cir. 2003). Neither *Bacchus* nor the other cases relied on by the Eighth Circuit have actually applied a strict scrutiny standard based solely on a "discriminatory purpose." In all of those cases, the regulation at issue either discriminated on its face or in effect. *See Bacchus*, 468 U.S. at 271 (regulation was passed with an undisputed discriminatory purpose, but also discriminated on its face and in effect); *Hunt v Washington State Apple Advertising Comm'n*, 432 U.S. 333, 352-53 (1977) (statute had the "practical effect" of discriminating against Washington apple growers and dealers while leaving North Carolina apple producers unaffected); *Waste Sys. Corp. v. County of Martin,* 985 F.2d 1381, 1386-87 (8th Cir. 1993) (ordinance discriminated on its face and in effect); *SDDS, Inc. v. South Dakota*, 47 F.3d 263 (8th Cir. 1995) (referendum discriminated in effect). Indeed, even where there existed evidence that a regulation was passed with discriminatory motives, this Court refused to apply strict scrutiny where the regulation did not discriminate on its face and applied equally to in-state and out-of-state interests. *See Clover Leaf Creamery*, 449 U.S. at 463 n. 7, 466, 471 n. 15.

The Eighth Circuit decision in this case is inconsistent with and expands this Court's dormant Commerce Clause precedent. If left unreviewed by this Court, the test applied by the Eighth Circuit could result in the invalidation of numerous state laws and leave states hamstrung in their attempts to provide for the well-being of their farming communities.

CONCLUSION

For the foregoing reasons, this Court should grant the petitions for a writ of certiorari.

Respectfully Submitted,

SUSAN E. STOKES
Counsel of Record
DAVID R. MOELLER
Farmers' Legal Action Group, Inc.
46 E. 4th Street, Suite 1301
St. Paul, MN 55101
(651) 223-5400
Counsel for Amici Curiae

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